IN THE

Supreme Court of the United States

No. 70-5040

JACK L. MAYER,
Appellant,

v.

THE CITY OF CHICAGO,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

HENRY F. FIELD
THOMAS B. MCNEILL
ROBERT A. BURT
231 South La Salle Street
Chicago, Illinois 60604
Counsel for Appellant

Washington, D. C. THIEL PRESS 202 393-0625

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"Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." –Publius, *The Federalist*, No. 51.

"An essential quality of judicial power is . . . always to be at the disposal of the humblest of those who solicit it; their complaint, however feeble they may themselves be, will force itself upon the ear of justice and claim redress, for this is inherent in the very constitution of courts of justice." –Alexis de Tocqueville, *Democracy in America*, Book IV, Chapter VII.

ARGUMENT

I. *WILLIAMS v. OKLAHOMA CITY* IS INDISTINGUISHABLE.

In its brief, the City of Chicago, as Appellee (hereinafter "the City"), suggests that *Williams v. Oklahoma City* is inapplicable here because in *Williams* an Oklahoma statute made the filing of certain portions of the record a "condition precedent" to filing an appeal, whereas Illinois has no such statutory requirement.

Surely this fact, if accurate, cannot be controlling here. For it is as true in Illinois as it is in Oklahoma, indeed everywhere, that in order to present questions to an appellate court a sufficient record of what actually transpired at trial to permit the court to adequately consider the questions raised must be supplied. As Appellant has amply shown in his initial Brief, no alternative means to a transcript for presenting the relevant facts of his case to the Illinois Supreme Court exists. And it is certain that without an adequate factual portrayal of his points on appeal, Appellant will be given short shrift in Illinois. See, *e.g.*, *People v. Rockett*, 85 Ill. App. 2d 24, 228 N.E.2d 219, 223 (1967) (the Illinois courts presume the facts against the appellant when the record presented is inadequate). The "distinction" the City seeks to make, therefore, is between a meaningless appeal and no appeal at all.[1]

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[1] The City's attempt to coax this Court to overrule *Griffin v. Illinois*, 351 U.S. 12 (1956), and the multitude of cases elaborating *Griffin*, on the basis that the abstract concept of equality then preferred by the dissent in that case—that the states have no "affirmative duty to lift the handicaps flowing from differences in economic circumstances"—should once again obtain, evidences a serious misconception of the nature of the Constitutional value at stake. The rejoinder has been well made:

> "Equality never means equality. Equality is always for some purpose and in a sense it includes inequality . . . . It includes the notion of compensating. The law has always done that. If a person deals with an expert, the expert has to be more cautious than the other person, because that's equality, and so on. To say that there can't be equality and

II. THE CONSTITUTIONAL RIGHT TO VINDICATE INNOCENCE THROUGH A TRANSCRIPT SHOULD INURE TO ALL PERSONS WHOM THE STATE SEEKS TO PENALIZE AND STIGMATIZE THROUGH ITS CRIMINAL LAWS, OR WHO FACE THE BURDEN OF ANY PENAL SENTENCE.

The City urges this Court to approve Illinois' denial of a fundamental Constitutional right to Appellant—the Fourteenth Amendment right to a transcript or report of proceedings needed to demonstrate substantial trial errors—on the ground that the punishment Illinois chose to exact here took the form of a substantial and crippling fine rather than some form of imprisonment or jail. Constitutional rights, the City says, should stop at the jailhouse door. This should be true, the argument seems to proceed, even though real and serious consequences attend conviction and imposition of punishment in cases not resulting in a jail term. In such cases the State should get its pound of flesh and the citizen should not seek justice: especially not in long-standing Constitutional doctrine such as this Court propounded in *Griffin v. Illinois*, 351 U.S. 12 (1956).

The distinction between jail and non-jail which the City urges this Court to adopt as a stopping point for the Fourteenth Amendment is devoid of meaning and purpose. Does a sentence to imprisonment or jail include a suspended sentence? Probation? Work-release? Sentence to a "Juvenile Home" or "Treatment Center" or, as in Cook County, to a "House of Correction"? A "half-way house"? Is an indigent person whose sentence on a felony or misdemeanor is suspended to receive constitutional protection while an indigent sentenced to pay a $1,000 fine for violation of a municipal ordinance is not? Such an arbitrary distinction

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therefore the idea is thrown away is really not understanding the dynamism that is in the very concept of equality itself.". Edward H. Levi, in *The Quality of Inequality: Urban and Suburban Public Schools* (Univ. of Chicago Center for Policy Study 1968, at pp. 111-112).

would be especially inappropriate at this point in history, when the concept of imprisonment as a means of dealing with the vast bulk of offenders is losing its tenability. See, *e.g.*, George Bernard Shaw, *The Crime of Imprisonment* (Philosophical Library, N.Y., 1946); Hans Mattick and Aikman, "The Cloacal Region of American Corrections," *The Annals of the American Academy of Political and Social Science*, Vol. 381, pp. 109-118 (Jan. 1969). We are increasingly coming to understand that "for the large bulk of offenders, particularly the youthful, the first or the minor offender, institutional commitments can cause more problems than they solve." *The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice*, p. 165 (U.S. Gov. Printing Office, 1967). Recent outbreaks in prisons across the country, and reactions to them, attest to the need, proclaimed in editorials and journals alike, for prison reform and alternatives to imprisonment. These demands will increase and alternatives will be found. Are then most citizens convicted of crime to lose their Constitutional rights because they do not happen to be sentenced to jail?

Whether or not the State chooses to inflict one form of punishment or another in a given case or category of offenders—by jail, fine, probation or otherwise—is irrelevant to the Constitutional interest at stake here. The Fourteenth Amendment right to "stand on an equality before the bar of justice in every American court," *Chambers v. Florida*, 309 U.S. 227, 241 (1940), by being able, through a transcript, to demonstrate innocence of the crime charged and the lack of a fair trial, exists, at a minimum, *wherever a penal burden is sought to be imposed by the State.* An indigent's right to equality exists in at least some "civil" situations as well. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce). The factor of imprisonment—one of many forms of detriment and stigma—cannot be a necessary condition for the existence of the right.[2]

[2]Contrary to the City's urgings, there is no magic to the fact that the prosecuting authority here happened to be a municipality of the State rather than the State itself. This Court has often applied the

III. THE CITY'S FANTASY OF A "FLOOD" OF "TRIVIAL" APPEALS IS REFUTED BY THE FACTS

The City in its brief employs, as expected, the "scare tactic" of assuming that to grant this Appellant his transcript is somehow to extend "the *Griffin* principle to every conceivable petty offense." *Brief of Appellee* at 17. We are told that there are "a bewildering variety" of ordinance violations, "an untold number" of which "are petty and many are of the utmost triviality." *Brief of Appellee* at 16. Moreover, the City posits a "flood" of appeals in these "trivial" cases, most of which, it assures us, will be "frivolous." Searching at length to find support for this hypothesis, the City devotes pages of its Brief to a recitation of the number and location of courtrooms in Cook County, the estimated total numbers of non-felony violations charged in the nation each year, and the growth in recent years in appellate dockets. It is apparent that none of these facts bear on the issue here.

In the first place, it is no argument that a starving man should be denied food because someone else who is not starving may later come along and ask for some. It is in the nature of the judicial task to draw lines. There is no unique difficulty to doing so here. And it is a fallacy to assume that because a felony case may in general be more important to a defendant than a non-felony case, that therefore all non-felony cases are unimportant to all defendants. The City's continued assertion that these are "petty" cases creates the false equation felony-important therefore non-felony-unimportant.[3]

Fourteenth Amendment (*Yick Wo v. Hopkins*, 118 U.S. 756 (1886); *Williams v. Oklahoma City*, 395 U.S. 458 (1969)), and other Amendments (*e.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967) (the Fourth Amendment)), to municipal fine cases.

[3]There is no reason to assume, as the City would have us, that truly "trivial" cases will be appealed. Of course, the City's evaluation of what is "trivial" may be expected to differ from a particular defendant's.

Secondly, no one wishes the courts to be flooded with any cases, much less trivial cases, and much less frivolous and trivial cases. Certainly our courts are already overburdened with trivial and frivolous cases, in the sense that such cases do exist on the dockets, and any number is too many. We would wish them all away. But a rational and just solution surely is not to draw a line which closes the appellate doors only to the impoverished (meritorious and unmeritorious alike), while leaving the doors open to the more affluent (meritorious and unmeritorious alike). Clearly, wherever the answer to crowded dockets lies, it does not lie down the road of closing the court system only to the poor.

Thirdly, and most importantly, as the City's own statistics amply demonstrate, whether for "triviality" or some other reason, almost all convicted nonfelony defendants (and especially ordinance violators) *choose not to appeal when they have full means to do so.* For, as the studies which the City cites show (*Brief for Appellee* at 32-33), no more than 25% of misdemeanor defendants are indigent, and a vastly lower percentage of ordinance violators are so, yet it is a striking fact that our appellate systems are so free of appeals from convictions for "minor" offenses. See *Brief of Appellant* at 33-34, n. 36.[4] The significance of this in-

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[4]For the one-year period December 1969–December 1970, the Illinois Appellate Court, all districts, decided a total of 1421 appeals (120 Ill. App. 2d–129 Ill. App. 2d). Those 1421 appeals represent the following:

Number of Appeals	*Percent of Total Appeals*
total civil appeals: 1171	82%
total criminal appeals: 250	18%
total nonfelony criminal appeals: 30	2%
total defendant sentenced to fine only: 17	1%
total ordinance violations: 4	.3%
total traffic violations: 15	1%
total (all types of appeal): 1421	100%

digency figure is not, as the City assumes, to suggest that 25% of all misdemeanor cases will appear on the appellate dockets, *but rather that at least 75% of all such defendants have the means to appeal their convictions but have chosen not to do so.* Silverstein, *Defense of the Poor*, 124-125 (Vol. 1, 1965). If our appellate dockets are so devoid of misdemeanor and ordinance appeals *when over 3 out of every 4 defendants possess the financial means to appeal*, there is no reason to believe, indeed there is positive ground to disbelieve, that making an appeal possible for a deserving indigent defendant in the remaining one-quarter or less of cases will cause any statistically significant increase at all in docket size. The inevitable conclusion following from these figures is that whatever the factors are which motivate and determine the appeal rate in these misdemeanor and ordinance cases, it is *not* the money to procure a transcript.[5]

The City has gone to some length in its brief to overwhelm the Court with numerous figures and statistics relating to such items as the courtrooms and cases in Cook County, Illinois and selected appellate docket figures. Unlike Appellant's systematic presentation of facts and assumptions, the City employs an amorphous shotgun approach to data. The relevance or meaningfulness of most of the statistics cited by the City, assuming their accuracy, is tangential or obscure. Therefore, only several points with relation to them will be made here.

1. Since the issue here is the right of a convicted poor person to an existing, available transcript necessary, *inter alia*, to demonstrate the conduct of the prosecutor which

[5]Note should be made when discussing the "cost" of providing free transcripts to indigents that improvements in the technology of reporting trials, principally by the use of tape recorders and recording devices, have made possible enormous savings in stenographic fees. Such devices are now operational in many federal courts. The reluctance on the part of states and counties to effect these savings by installing such devices speaks eloquently perhaps to the effectiveness of the stenographers' lobby.

resulted in the deprivation of a fair trial, figures about the number of *charges* brought per year against nonfelony defendants, and the number of courtrooms or trials, are not meaningful. See *Brief for Appellee* at 28-32. What is perhaps meaningful is the number of *convictions after trial*, which excludes pleas of guilty. This figure comprises the total possible universe of appeals. The number of acquittals, trials, or pleas are unimportant except so far as they illuminate this category. The City's statistics on this point obfuscate, not illuminate. *Cf.*, *Brief for Appellant* at pp. 28-38.

2. The City's figures on the docket increase for the Supreme Court of Washington between 1962 and 1968 (*Brief of Appellee* at 24) demonstrate the opposite of what the City argues they show. Far from showing a flood of indigent appeals, the figures show, for the full years 1962 to 1967 inclusive, a percentage increase of over 300% in criminal appeals but an increase of only 17% overall in the percentage of those appeals which are indigent appeals. There was, then, indeed a dramatic increase in *criminal* appeals, but the number of *indigent* criminal appeals merely kept pace, with some slight increase possibly due to increased awareness of the right, with the non-indigent criminal appeals. Moreover, the fact that the Public Defender of Cook County averaged only 6 felony appeals per year up until 1964 says something about the way justice actually is measured out in Illinois. A subsequent increase to 150 per year hardly supports the idea that the Public Defender is in the business of generating frivolous appeals. It attests to a need which was unsatisfied. But even so the felony experience is not a persuasive model for the misdemeanor and ordinance experience.[6]

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[6]The estimate cited with respect to the cost of providing *counsel* at the *trial* of all misdemeanor cases–$62,500,000 for all state courts (Silverstein, *Defense of the Poor* (1965) Vol 1, pp. 124-125) (an average of little over a million dollars per state per year) is hardly a persuasive "horrible" here. In the first place, the average ordinance violation does not require much counsel time. In the second place,

There can be no denying that—indeed it is only to be hoped that—there will be *some* increase in appeals as a result of a favorable decision in this case. Some victims of administered injustice will be able to secure reversals and the level of justice will increase. A net social gain will result. This is wholly to be desired.

Will there be a "flood" of nonfelony appeals? The facts clearly suggest otherwise. There will, at most, be some increase in the few non-felony appeals now on the dockets. See *Brief for Appellant* at 33, n. 36. One-quarter of a few is not many.

Will there be many "frivolous" nonfelony appeals? Assuming for a moment we agree on what is a "frivolous" appeal, since there will not be many nonfelony appeals, especially ordinance appeals, there will not be many "frivolous" ones.

Will "petty" cases be appealed in great numbers? They are not being so now although most persons convicted of petty offenses have ample means to do so. Clearly other factors than the availability of means to afford a transcript control the decision not to appeal these cases.

IV. THE CONCEPT OF INDIGENCY IS WELL KNOWN TO THIS COURT.

In an apparent attempt to wind the clock back several decades, the City attacks the notion of indigency itself, and seems to argue that, because there are no sharp lines between the categories "those too poor to pay" and "those not too poor to pay" for transcripts, therefore to provide transcripts to the former discriminates against "the working

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the question presented is not whether all nonfelony defendants should be afforded free *counsel* at their *trials*, but whether a particular appellant can have access to a copy of his *transcript* in order to demonstrate to the Supreme Court of Illinois that he was wrongly convicted of two criminal offenses and sentenced to pay a $1,000 fine.

majority," who must purchase their transcripts "with hard-earned money." Surely this is disingenuous.

The concept of indigency is not one invented by this Appellant. Neither is it rigid in its application, as the many and various states and courts have worked out its specific content in cases that arise. In its application it is necessarily dependent upon the complex and detailed facts peculiar to the living condition of each applicant. Indigency is a factual question like all other factual questions and the courts have experienced no unusual difficulties in determining its specific content in each case.

Such was done here. The Circuit Court of Cook County, after a hearing, found this Appellant to be indigent. The City's attempts now to reargue in this Court this factual finding of record (those same arguments were rejected by the Circuit Court) is wholly inappropriate.

CONCLUSION

The order of the Supreme Court of Illinois denying Appellant's right to a transcript without payment of a fee should be reversed.

Respectfully submitted,

Henry F. Field
Thomas B. McNeill
Robert A. Burt
Attorneys for Appellant

APPENDIX OF STATE STATUTORY PROVISIONS AFFORDING TRANSCRIPTS FOR INDIGENT APPEALS IN FINE-ONLY CASES

A. *Introductory Note*

The lowest courts in the land, for example Justice of the Peace Courts, impose far and away the bulk of the fines, shorter jail terms, and similar penalties imposed on defendants in cases involving municipal ordinances, in traffic cases, and in certain non-penal regulatory proceedings. Some states expressly provide for the recording of testimony taken in these courts. For example, the Alaska Magistrate's Rules provide for electronic recording, and South Carolina Laws Sec. 7-104 requires a magistrate, upon a defendant's appeal, to file "the testimony in writing taken at the trial." But most states do not expressly provide for the recording of proceedings in these lowest courts. In these states it is unclear whether, in practice, such recordings are routinely made. It is uniformly required in these states, as a minimum, that judgment-roll records be kept of Justice of the Peace court proceedings.

For this reason, in all states (with the possible exception of Florida), an appeal is allowed from the lowest courts, which results in a trial *de novo* in a court of more general jurisdiction, where testimony taken in stenographically preserved. (In fact, relatively few defendants avail themselves of this opportunity to appeal.) It is the transcript of proceedings in these courts of more general jurisdiction that is necessary for any further appeal, or for initial appeal in those cases initially prosecuted in these courts.

This Appendix is not intended as a comprehensive statement of state transcript law; such an undertaking proved to be too complex. It does not include case law. Its focus is rather on the statutory provisions in those states which provide at least some qualifying indigents with transcripts in appeals from conviction for offenses punishable only by fine. The statutes of several states speak only in terms of felony convictions, or a certain term of imprisonment, and

these have been omitted. Included here are the statutes of 39 (approximately 75%) of the states, which statutes appear to provide transcripts for at least some indigent appellants sentenced only to pay a fine. In at least 29 of these states, there is an express statutory provision for free transcripts. At least 12 states, including four of the 29, provide counsel through appeal to at least some indigents sentenced to pay a fine only, and reimburse counsel's expenses.

B. *Counsel for Indigent Appellants Convicted of Fine-Only Offenses.*

The following states provide indigents convicted of certain fine-only offenses with counsel through appeal. Generally these states either provide a public defender system, which would pay for the cost of the transcript necessary to the appeal, or they reimburse appointed counsel for his reasonable expenses, which in the case of an appeal presumably includes the expense of necessary transcript preparation.

1. *California:* Penal Code 987.2 (1970).

2. *Colorado:* Stat. 39-21-3 (1963).

3. *Georgia:* Code Sec. 27-32 (1969).

4. *Idaho:* Code 19-851 *et seq.* (1969) ($300 fine entitles appellant to appointed counsel).

5. *Montana:* Code 95-1001 (1967); Code 95-1005 (1967).

6. *Nevada:* Stat. 178.397 (1967); Stat 260.060; Stat. 7.260 ($500 fine entitles appellant to appointed counsel).

7. *New Hampshire:* Stat. Sec. 604-A:1 *et seq.* (1967).

8. *New York:* Court of Appeals Rule 500.8.

9. *North Carolina:* Stat. Sec. 7A-450 *et seq.* (1969) ($500 fine entitles appellant to appointed counsel).

10. *North Dakota:* Code 29-07-01.1 (1967).

11. *South Dakota:* Laws Sec. 23-2 (1969).

12. *Vermont:* Stat. T.13, Sec. 6503 (1963) ($500 fine entitles appellant to counsel).

C. *Transcript Provisions for Indigents Convicted of Fine-Only Offenses*

The following 29 states have express transcript provisions broad enough to include transcripts for many indigents convicted of offenses punishable only by fine.

1. *Alabama:* Code T. 15, Sec. 380 (14-25) (1963).

2. *Arizona:* Criminal Procedure Rules 360 and 361; Stat. Sec. 12-123.

3. *Arkansas:* Stat. 22-357 (1962) (free transcripts to indigents in "all cases").

4. *Connecticut:* Stat. Sec. 54-151 (1967).

5. *Delaware:* Supreme Court Rule 10 A (any "indigent criminal appellant" gets free transcript if needed).

6. *Florida:* Appellate Rule 6.8 (free transcripts to all "appealing defendants"); Stat. 924.08 (1963) (no appeals on evidence from trials *de novo* in circuit courts).

7. *Hawaii:* Stat. Sec. 705-5 (1967) (discretionary free transcripts); Sec. 611-1 *et seq.* (free counsel for indigents charged with offenses punishable by imprisonment for more than 60 days).

8. *Idaho:* Code 1-1105 (1963) (free transcripts in "criminal actions"); Code 19-851 *et seq.* (1969) (free counsel and court services for crimes punishable by a fine of more than $300).

9. *Indiana:* Stat. 4-7309 (1968).

10. *Iowa:* Code Sec. 793.8 (1946).

11. *Kansas:* Stat. 62-3109 (1969) (any indigent entitled to appeal).

12. *Kentucky:* Stat. 28-440(1) -.460(2a) (1968) (free transcripts in all "criminal cases").

13. *Maine:* Criminal Procedure Rule 39A (conviction of "a crime").

14. *Maryland:* Rules of Procedure 1083(b) (free transcript in a "criminal case").

15. *Minnesota:* Stat. Sec. 611.07(1969)(free transcripts for offenses punishable by a fine of $100).

16. *Mississippi:* Code Sec. 1175, 1640 (1971) (in all "criminal cases").

17. *Missouri:* Stat. 485.100 (1965) (in all "criminal cases").

18. *Nebraska:* Stat. Sec. 24-342 (1964) (in "criminal cases").

19. *Nevada:* Stat, 177.345 (1969) (free transcripts for offenses punishable by 6 months imprisonment or a fine of $500).

20. *New Jersey:* Stat. 2A:152-17 (1956) (free transcript for "indigent convicted of any crime").

21. *New York:* Code of Criminal Procedure Sec. 456 (1962) (any "crime").

22. *North Carolina:* Stat. Sec. 7A-450 *et seq.* (1969) (offenses punishable by more than six months imprisonment or a fine of $500).

23. *Oklahoma:* Stat. 20 Sec. 106.4 (b) (1970) (any "criminal action").

24. *Oregon:* Stat. 138.500(2) (1969) (any "criminal action").

25. *South Carolina:* Laws Sec. 7-104 (1962); Sec. 7-343 (1962); Sec. 15-1903 (1962) (any "criminal case").

26. *Texas:* Code of Criminal Procedure Art. 40.09 (5); 4.03 (1965) (any indigent case over $100 fine gets free transcript).

27. *Utah:* Code 77-64-1, 77-64-5 (1965) (appointed counsel and free transcript to indigent defendants facing "the possibility of the deprivation of his liberty or other serious criminal sanction").

28. *Washington:* Code 2.32.240 (1970) (in "any criminal case").

29. *West Virginia:* Code Sec. 51-7-7 (1965).

D. *Free Transcripts Where Decreed by this Court.*

Alaska and Wisconsin have enacted provisions which will automatically provide free transcripts for indigents in any circumstances where the United States Supreme Court finds them required by the Constitution.

1. *Alaska:* Magistrate Rules 1 (i) and 2 (b); Court Rule 43 (b).

2. *Wisconsin:* Stat. 974.01(3) (1969).